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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KEITH R. PIERPONT, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, CITY OF TUCSON, Respondent Employer, PINNACLE RISK MANAGEMENT SERVICES, Respondent Carrier.	2 CA-IC 2011-0012 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 91289002733

Insurer No. WCTUC200050480

Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

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B R A M M E R, Judge.

¶1 In this statutory special action, petitioner Keith Pierpont challenges the Administrative Law Judge's (ALJ) decision upon review denying Pierpont's petition to reopen his claim based on his knee injury but awarding additional supportive care for associated gastrointestinal problems. Pierpont argues the ALJ erred by requiring him to demonstrate a need for active medical care and by failing to explain adequately the reasons for denying his petition to reopen. We affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). Pierpont injured his knee in 1991 while working as a firefighter and paramedic. He had surgery in 1992 and his claim was closed with a fifteen percent permanent disability. He was prescribed ibuprofen for supportive care. He petitioned to reopen his claim in 2008 claiming the condition of his knee had become worse. That petition was denied in October 2008. Pierpont had an additional surgery in 2010.

¶3 As a result of taking ibuprofen to combat the knee-related discomfort, Pierpont developed problems with stomach ulcers. In 2007, he was prescribed Nexium, and its regimen resolved the symptoms. In 2010 his private insurance changed and he could no longer afford Nexium. He stopped taking Nexium and, because he continued the ibuprofen regimen, his symptoms returned.

¶4 Pierpont filed his second petition to reopen in March 2010, alleging his condition had deteriorated. The carrier denied Pierpont's petition to reopen. Pierpont protested the denial and requested a hearing. Pierpont presented evidence regarding both his knee and associated gastrointestinal issues. At the hearing on Pierpont's petition to reopen, Dr. Bryan Contreras, a gastroenterologist, testified that Pierpont had erosive esophagitis and gastric ulcers as a result of his ibuprofen use, and recommended Pierpont take Nexium. That testimony was uncontradicted.

¶5 In his decision upon hearing, the ALJ found no objective change in the condition of Pierpont's knee since 2008 and thus denied his petition to reopen. The ALJ also found there was "no conflict in the medical evidence" regarding Pierpont's need for Nexium and ordered additional supportive care to include Nexium and two office visits per year with Contreras.[1] Pierpont filed a request for review. In the decision upon review, the ALJ supplemented his findings stating that Pierpont's ulcers constituted a

[1]Although the carrier states the supportive care award was in error, it did not request relief and thus we do not address the issue further. *See* Ariz. R. P. Spec. Actions 10(f) (if respondent desires to request affirmative relief must add to notice of appearance statement that it intends to request relief and must include actual request in answering brief); *see also Smith v. Indus. Comm'n*, 184 Ariz. 511, 514, 910 P.2d 662, 665 (App. 1996).

"new, additional and/or previously undiscovered condition since the original closure effective October 8, 1992," and the "ulcers were not dealt with in the 2008 litigation." The ALJ otherwise affirmed the award.

¶6 This statutory special action followed. We have jurisdiction pursuant to A.R.S. § 23-951.

Discussion

¶7 Pierpont argues the ALJ erred in denying his petition to reopen his claim because his ulcers are a new, additional, or previously undiscovered condition causally related to his industrial injury.[2] Our review is limited to "determining whether or not the commission acted without or in excess of its power" and whether the findings of fact support the ALJ's decision upon review. § 23-951(B). "[W]e defer to the ALJ's factual findings but review questions of law de novo." *Hahn v. Indus. Comm'n*, 227 Ariz. 72, ¶ 5, 252 P.3d 1036, 1038 (App. 2011).

¶8 Section 23-1061(H), A.R.S., "strikes a balance between finality principles, which preclude relitigation of issues that were or that could have been determined when the claim was closed or at previous adjudications, and remedial principles." *Lovitch v.*

[2]To the extent Pierpont also argues the ALJ erred in denying his petition to reopen based on his knee injury, he has not developed that argument adequately, as his briefing focuses primarily on his ulcers. Therefore, we address only his contentions regarding his petition to reopen based on his gastrointestinal conditions. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellate brief argument shall contain "citations to the authorities, statutes and parts of the record relied on"); Ariz. R. P. Spec. Actions 10(k) (Arizona Rules of Civil Appellate Procedure apply to special action review of industrial commission awards); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393-94 n.2 (appellant's failure to develop and support argument waives issue on appeal).

Indus. Comm'n, 202 Ariz. 102, ¶ 18, 41 P.3d 640, 644 (App. 2002). It states in relevant part:

> On a claim that has been previously accepted, an employee may reopen the claim to secure an increase or rearrangement of compensation or additional benefits by filing with the commission a petition requesting the reopening of the employee's claim upon the basis of a new, additional or previously undiscovered temporary or permanent condition . . . .

§ 23-1061(H). The claimant has the burden of proving that reopening is warranted. *See Lovitch*, 202 Ariz. 102, ¶ 17, 41 P.3d at 643-44.

¶9 "[R]eopening is permissible when a change in physical circumstances or medical evaluation creates a need for treatment, and the legitimacy of that need was not and could not have been adjudicated at the time of the last award." *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 18-19, 695 P.2d 261, 267-68 (1985). Thus a change in physical condition or medical needs is a "prerequisite of reopening for a new or additional condition." *Id.* at 19, 695 P.2d at 268. Preclusion is applied to conditions "'existing and known'" when the claim was closed last. *Perry v. Indus. Comm'n*, 154 Ariz. 226, 229, 741 P.2d 693, 696 (App. 1987), *quoting Stainless Specialty*, 144 Ariz. at 16, 695 P.2d at 265.

¶10 The relevant comparative date for Pierpont's petition to reopen is October 2008, the date his previous petition to reopen was denied. *See Lovitch*, 202 Ariz. 102, n.1, 41 P.3d at 644 n.1; *Cornelson v. Indus. Comm'n*, 199 Ariz. 269, ¶ 14, 17 P.3d 114, 116 (App. 2001); *Phx. Cotton Pickery v. Indus. Comm'n*, 120 Ariz. 137, 139, 584 P.2d 601, 603 (App. 1978). Pierpont's gastrointestinal conditions are not new, additional,

or previously undiscovered since that date. *See* § 23-1061(H). And his need for Nexium is not new. *See Stainless Specialty*, 144 Ariz. at 19, 695 P.2d at 268. As the ALJ summarized the record, it supports a finding that Pierpont's ulcers first were diagnosed in 2007 and he was prescribed Nexium at that time. *See Lovitch*, 202 Ariz. 102, ¶ 22, 41 P.3d at 645 (record indicated condition not previously undiscovered because diagnosed before last award). Because Pierpont's ulcers were "'existing and known'" when his claim was closed last, he is precluded from reopening on that basis. *See Perry*, 154 Ariz. at 229, 741 P.2d at 696, *quoting Stainless Specialty*, 144 Ariz. at 16, 695 P.2d at 265.

¶11 Pierpont relies on *Circle K Corporation v. Industrial Commission*, 179 Ariz. 422, 880 P.2d 642 (App. 1993), for his assertion that claim preclusion should not bar reopening of his claim. But *Circle K* is distinguishable because, there, the ALJ found the petitioner had a "new, additional or previously undiscovered condition" and that finding was supported by the record and had not been challenged directly. *Id.* at 427, 880 P.2d at 647; *see also Cornelson*, 199 Ariz. 269, ¶ 16, 17 P.3d at 117 (noting *Circle K* distinguishable because "[t]he *Circle K* claimant . . . established what the present Claimant could not, namely, a change in condition between successive petitions to reopen).

¶12 Division one of this court noted in *Circle K*, 179 Ariz. at 426, 880 P.2d at 646, that "courts hesitate to apply preclusion when . . . the party against whom preclusion is sought had no incentive to litigate." The court then went on to say claim preclusion did not apply because the exception in § 23-1061(H) was satisfied and the claimant "had little financial incentive to litigate the issue of causation at the time her first claim to reopen

became final." *Id.* at 427, 880 P.2d at 647. However, whether prior lack of financial incentive to litigate a previously known condition is sufficient to reopen a claim when § 23-1061(H) is not satisfied was not an issue before the court in *Circle K*. Accordingly, the court's suggested alternative basis for determining claim preclusion did not apply was dictum. *See State v. Kelly*, 210 Ariz. 460, ¶ 5, 112 P.3d 682, 684 (App. 2005). And, to the extent Pierpont reads *Circle K* to suggest the requirements of § 23-1061(H) can be avoided where a claimant may have no or insufficient financial reason to pursue litigation, he is incorrect. *Circle K* simply stands for the limited proposition that a claimant is not required to continue litigating the issue of causation "in case she has an unforeseen future change in condition that would require reopening her claim." *Id.* at 428, 880 P.2d at 648. Further, Pierpont has not convinced us the "lack of financial incentive to litigate" exception to preclusion is implicated here in any event.

¶13 Claim preclusion applies to a petition to reopen a claim when: "(1) a prior claim has become a valid and final judgment . . . and (2) the exceptions crafted by the legislature have not been satisfied." *See id.* Pierpont had the burden to demonstrate a change in his condition since October 2008, which he did not. *See Phx. Cotton Pickery*, 120 Ariz. at 139, 584 P.2d at 603. Pierpont's claim was closed when his prior petition to reopen was denied and he has not satisfied the exception to preclusion in § 23-1061(H). *See Circle K*, 179 Ariz. at 428, 880 P.2d at 648. Therefore, the ALJ did not err in denying his petition to reopen.

¶14 Pierpont also alleges the ALJ "requir[ed] [him] to demonstrate a need for active medical treatment in order to reopen his claim." During the hearing on Pierpont's

petition to reopen, the ALJ asked Contreras whether the issue was "active treatment here at this point . . . versus supportive treatment to maintain" and clarified the issue was "more in the realm of supportive care." Pierpont objected to the question as beyond the scope of a reopening determination. The ALJ overruled the objection, stating he "want[ed] the record to be complete" if he needed to deal with the issue "from a different route." The ALJ's question is the only evidence Pierpont offers to support his contention the ALJ imposed a "'need for active medical treatment' standard." However, the ALJ noted when overruling the objection that "there could be a reopening under the current case law for supportive care." Moreover, he cited the correct standard in his decision upon hearing, stating "[a]n applicant does not have to show that he is in need of active medical treatment in order to reopen his claim" and that he need show only "a new, additional [or] previously undiscovered condition." *See Wyckoff v. Indus. Comm'n*, 169 Ariz. 430, 435, 819 P.2d 1016, 1021 (App. 1991). Therefore, Pierpont has not shown the ALJ applied an incorrect legal standard.

¶15 Pierpont also argues the ALJ erred by failing to explain adequately the reasons for denying his petition to reopen. He contends the ALJ's findings "were not sufficiently specific" to meet the standard described in *Post v. Industrial Commission*, 160 Ariz. 4, 770 P.2d 308 (1988), and the ALJ did not address reopening as to his gastrointestinal complaints, precluding adequate appellate review. We disagree.

¶16 An ALJ must make findings on material issues and resolve conflicts in the evidence. *Post*, 160 Ariz. at 7-8, 770 P.2d at 311-12. The findings must be sufficiently specific so that in any future reopening there is "a basis to determine whether a new,

additional, or previously undiscovered condition is causally related to the accident. *Id.* at 8, 770 P.2d at 312; *see also Douglas Auto & Equip. v. Indus. Comm'n*, 202 Ariz. 345, ¶ 9, 45 P.3d 342, 344 (2002) ("findings need not be exhaustive" but must allow reviewing court to determine basis for conclusions). In *Post*, the ALJ "made no factual findings of consequence, resolved no conflicts in the evidence, and set forth no conclusions applying law to fact." 160 Ariz. at 5, 770 P.2d at 309. The claimant there had presented evidence regarding both his assertion of a new condition and its causal relationship to his industrial injury. *Id.* at 6, 770 P.2d at 310. Because the ALJ denied reopening despite making no findings on either issue, it was unclear whether the ALJ found the claimant did not have a new condition or the condition was not related to the original injury, thus precluding appellate review. *Id.* This case is distinguishable.

¶17 Here, the ALJ reviewed the testimony and evidence, made detailed findings regarding Pierpont's gastrointestinal conditions, and noted there was no conflict in the medical evidence indicating Pierpont was prescribed ibuprofen for supportive care and he required Nexium to prevent ulcers while taking ibuprofen. The ALJ found Pierpont had ulcers and esophageal erosions in 2007 and was prescribed Nexium, but did not "bring up the gastrointestinal issue in [the] 2008 reopening hearing because he had been 'cured' by Nexium." In the decision upon review, the ALJ affirmed the award and further clarified the ulcers were new since the original closure date in 1992 and were not at issue in the 2008 reopening. These findings are sufficiently comprehensive for us to determine the ALJ denied Pierpont's petition to reopen as to his gastrointestinal condition because it was not a new condition. *See Douglas Auto & Equip.*, 202 Ariz. 345, ¶ 9, 45 P.3d at 344.

¶18 Substantial evidence supports the ALJ's denial of Pierpont's petition to reopen and he did not err in applying the law. *See Roberts v. Indus. Comm'n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). Pierpont failed to establish the existence of a new, additional, or previously undiscovered condition as required by § 23-1061(H).

Disposition

¶19 For the foregoing reasons, the award is affirmed.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge